

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Michael W. Perry
Cross City, FL

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File No.: EB-11-TP-0016
NAL/Acct. No.: 201232700003
FRN: 0021257456

FORFEITURE ORDER

Adopted: March 6, 2012

Released: March 6, 2012

By the Regional Director, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (Order), we issue a monetary forfeiture in the amount of four hundred fifty dollars (\$450) to Michael W. Perry for willful violation of Section 301 of the Communications Act of 1934, as amended (Act),¹ and Sections 95.409 and 95.411 of the Commission's rules (Rules).² The noted violations involved Mr. Perry's operation of a radio transmitter without the requisite Commission authorization and his failure to operate a Citizens Band (CB) station in conformity with the Rules. The monetary forfeiture imposed reflects consideration of Mr. Perry's inability to pay claim.

II. BACKGROUND

2. On November 1, 2011, the Enforcement Bureau's Tampa Office (Tampa Office) issued a Notice of Apparent Liability for Forfeiture and Order (NAL)³ to Mr. Perry for operation of a radio transmitter without the requisite authorization. As discussed in detail in the NAL, agents from the Tampa Office determined that Mr. Perry operated a non-certified CB transmitter and two linear amplifiers on CB channel 28 (on frequency 27.2850 MHz) on March 31, 2011.⁴ In view of the record evidence, the NAL proposed a \$10,000 forfeiture against Mr. Perry for violation of Section 301 of the Act and Sections 95.409 and 95.411 of the Rules.⁵ Mr. Perry submitted a response to the NAL, denying that he operated the non-certified CB transmitter and amplifiers, and requesting cancellation or reduction of the forfeiture based on his inability to pay.⁶

¹ 47 U.S.C. § 301.

² 47 C.F.R. §§ 95.409, 95.411.

³ *Michael W. Perry*, Notice of Apparent Liability for Forfeiture and Order, 26 FCC Rcd 15440 (Enf. Bur., Tampa Office 2011) (NAL).

⁴ *See id.* A comprehensive recitation of the facts and history of this case can be found in the NAL and is incorporated herein by reference.

⁵ *See id.* at 15442, para. 6.

⁶ Letter from Michael W. Perry to Federal Communications Commission (received by the Tampa Office Dec. 2, 2011) (on file in EB-11-TP-0016) (NAL Response).

III. DISCUSSION

3. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁷ Section 1.80 of the Rules,⁸ and the *Forfeiture Policy Statement*.⁹ In examining Mr. Perry's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹⁰ As discussed below, after full consideration of Mr. Perry's response in light of these statutory factors, we affirm our findings in the *NAL* that Mr. Perry violated Section 301 of the Act and Sections 95.409 and 95.411 of the Rules, but reduce the \$10,000 forfeiture proposed to \$450 based solely on his documented inability to pay.

4. First, we find that Mr. Perry violated Section 95.409 of the CB Rules. Specifically, Section 95.409(a) states that CB operators must use FCC certificated CB transmitters at their CB stations and that the use of a transmitter that is not FCC certificated voids the authority to operate the station.¹¹ As set forth in the *NAL*, agents from the Tampa Office determined, using direction-finding techniques, that Mr. Perry's residence was the source of signals on CB channel 28 on March 31, 2011.¹² The agents inspected Mr. Perry's CB station, which consisted of a non-certificated CB transmitter and three linear amplifiers. The agents observed that the transmitter and two of the linear amplifiers were not connected to each other, but were warm to the touch, indicating that they had been recently operated. During the inspection, Mr. Perry admitted that he operated this CB station that evening. In his *NAL Response*, however, Mr. Perry disputes some of our factual findings, asserting that the non-certificated CB transmitter and linear amplifiers were warm to the touch during the inspection, not because he was operating it, but because he "turn[ed] it on to dry because it is stored in an addition that has no heat, air or insulation."¹³ In addition, Mr. Perry asserts he had the equipment because he was studying for his amateur radio license and that "[a]t no time did I tell the inspectors that I operated that equipment."¹⁴

5. Even if we accept as true (which we do not) that Mr. Perry never admitted to the agents that he operated the unauthorized equipment, it remains undisputed that transmissions on CB channel 28 emanated from Mr. Perry's residence on March 31, 2011, and that he was not using an FCC certificated CB transmitter, as Section 95.409 requires. When the agents requested to inspect the CB station in the residence, Mr. Perry first took them to a CB station in his kitchen. This station consisted of a certificated CB transmitter and a linear amplifier, both of which were cold to the touch and neither of which was connected to each other or an external antenna. The agents also attempted to connect the microphone, which Mr. Perry stated was used at his station, but found that the four-pin connector did not fit into the six-pin microphone receptacle in the transmitter. The agents reiterated their request to inspect his CB station, and Mr. Perry took them to the non-certificated CB transmitter and three linear amplifiers. The non-certificated CB transmitter was connected to an external antenna, but was not connected to the three linear amplifiers next to it. Although Mr. Perry now denies operating this equipment and claims the equipment was only turned on to dry, we find his assertions implausible. Because the non-certificated CB transmitter was the only CB transmitter in Mr. Perry's residence which was connected to an external antenna and was

⁷ 47 U.S.C. § 503(b).

⁸ 47 C.F.R. § 1.80.

⁹ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

¹⁰ 47 U.S.C. § 503(b)(2)(E).

¹¹ 47 C.F.R. § 95.409(a).

¹² See *NAL*, 26 FCC Rcd at 15440, para. 2.

¹³ *NAL Response* at 1.

¹⁴ *Id.*

warm to the touch, and because a CB transmitter was operated from Mr. Perry's residence, we conclude that Mr. Perry operated the non-certificated CB transmitter on March 31, 2011, in violation of Section 95.409.

6. Second, we also find that Mr. Perry violated Section 95.411 of the CB Rules. Specifically, Section 95.411(a) of the Rules states that CB operators may not attach external radio frequency (RF) power amplifiers (sometimes called "linears" or "linear amplifiers") to certificated CB transmitters in any way.¹⁵ Further, Section 95.411(b) of the Rules states that there are no exceptions to this rule and that use of a power amplifier voids the authority to operate the station.¹⁶ Although Mr. Perry now denies operating the two warm amplifiers located next to the non-certificated CB transmitter, there is no escaping the fact that Mr. Perry nonetheless was in possession, in his home, of the two amplifiers which, under the Commission's rules, is presumed to be use of unauthorized equipment when combined with other evidence of operation, as we have here. As Section 95.411(c) states: the "FCC will presume you have used a linear or other external RF power amplifier if – (1) It is in your possession or on your premises; and (2) There is other evidence that you have operated your CB station with more power than allowed by CB Rule 10, § 95.410."¹⁷ Because two warm-to-the-touch linear amplifiers were located in Mr. Perry's residence next to a non-certificated CB transmitter that had been operated that evening, we presume he used the two amplifiers at his CB station on March 31, 2011, and, therefore, was in violation of Section 95.411.

7. Furthermore, because Mr. Perry was operating his CB station in a manner inconsistent with the CB Rules, as discussed above, he was required to have Commission authorization to continue operating. Mr. Perry, however, did not have a Commission license. Section 301 of the Act states that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio within the United States, except under and in accordance with the Act and with a license.¹⁸ Section 95.404 of the Rules states that CB operators are not required to have individual licenses because they are authorized by this rule to operate a CB station, *provided, however*, that they operate the station in accordance with Subpart D of Part 95 of the Rules (i.e., the CB Rules).¹⁹ As such, operation of CB stations in a manner that is inconsistent with the CB Rules requires a license pursuant to Section 301 of the Act.²⁰ Because Mr. Perry was operating his CB station in a manner inconsistent with the CB Rules and did not otherwise possess a Commission license (a fact that he does not dispute), we find that Mr. Perry also willfully violated Section 301 of the Act.

8. With regard to an individual or entity's inability to pay claim, the Commission has determined that, in general, gross revenues are the best indicator of an ability to pay a forfeiture.²¹ Based on the financial documents provided by Mr. Perry, we find sufficient basis to reduce the forfeiture to \$450.²² However, we caution Mr. Perry that a party's inability to pay is only one factor in our forfeiture

¹⁵ 47 C.F.R. § 95.411(a).

¹⁶ 47 C.F.R. § 95.411(b).

¹⁷ 47 C.F.R. § 95.411(c).

¹⁸ 47 U.S.C. § 301.

¹⁹ 47 C.F.R. § 95.404 (emphasis added).

²⁰ 47 U.S.C. § 301.

²¹ See *PJB Communications of Virginia, Inc.*, Forfeiture Order, 7 FCC Rcd 2088, 2089 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Local Long Distance, Inc.*, Forfeiture Order, 16 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, Forfeiture Order, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

²² This forfeiture amount falls within the percentage range that the Commission has previously found acceptable. See *supra* note 21.

calculation analysis, and not dispositive.²³ We have previously rejected inability to pay claims in cases of repeated or otherwise egregious violations.²⁴ Therefore, future violations of this kind may result in significantly higher forfeitures that may not be reduced due to Mr. Perry's financial circumstances.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80(f)(4) of the Commission's rules, Michael W. Perry **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of four hundred fifty dollars (\$450) for violations of Section 301 of the Act and Sections 95.409 and 95.411 of the Commission's rules.²⁵

10. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days of the release of this Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for enforcement pursuant to Section 504(a) of the Act.²⁶ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Mr. Perry shall also send electronic notification on the date said payment is made to SCR-Response@fcc.gov.

11. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent by both First Class and Certified Mail, Return Receipt Requested, to Michael W. Perry at his address of record.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton
Regional Director, South Central Region
Enforcement Bureau

²³ See 47 U.S.C. § 503(b)(2)(E) (requiring Commission to take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require).

²⁴ *Kevin W. Bondy*, Forfeiture Order, 26 FCC Rcd 7840 (Enf. Bur., Western Region 2011) (holding that violator's repeated acts of malicious and intentional interference outweigh evidence concerning his ability to pay); *Hodson Broadcasting Corp.*, Forfeiture Order, 24 FCC Rcd 13699 (Enf. Bur. 2009) (holding that permittee's continued operation at variance with its construction permit constituted an intentional and continuous violation, which outweighed permittee's evidence concerning its ability to pay the proposed forfeitures).

²⁵ 47 U.S.C. §§ 301, 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80(f)(4), 95.409, 95.411.

²⁶ 47 U.S.C. § 504(a).